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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/963,812
Filing Date: September 26, 2001
Appellant(s): SCHLEICHER ET AL.

Anthony J. Josephson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 1 August 2008 appealing from the Office action mailed 4 February 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Application numbers: 10/032,751 and 10/991,718.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: In section (6) C. of Appellant's Appeal Brief filed 1 August 2008, the Grounds of Rejection should read, "...co-pending U.S. Patent Application No. **09/**814,319 in view of Ferguson.", and not U.S. Patent Application No. 08/814,319.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

2002/0062290 A1	RICCI	5-2202
5,819,092	FERGUSON et al.	10-1998

Applicant's Admission of the Prior Art

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims **1-6, 9-14, 17-22 and 26-29** are rejected under 35 U.S.C. 103(a) as being unpatentable over Ricci, Pub. No. US2002/0062290 A1 in view of Ferguson et al., U.S. Patent No. 5,819,092.

As per **Claims 1, 9, 17 and 29**, Ricci discloses a method for generating revenue in a peer-to-peer file delivery network, the network including at least one server node and multiple client nodes, the method comprising the steps of:

(a) enabling peer-to-peer file sharing of content by,

- (i) initiating on one client node a download of a particular content item served from the server node or another client node (0030-0033), and

- (ii) charging a fee based on a quantity of the content served (0022, 0053); and

(b) enabling decentralized downloads of subscription-based content by

- (i) allowing the client nodes to subscribe to one or more of the subscription-based content (0057, 0061),
- (ii) periodically sending the subscribed to subscription-based content to each the respective subscribing client nodes (0040, 0042, 0044, 0062-0067).

Nonetheless, Ricci fails to disclose charging a fee to providers of the subscription-based content for serving the subscription-based content. However, Ferguson et al. teaches levying fees on content providers for transactions with the users (C. 4, lines 53-60). Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the method of Ricci and charge a fee to subscription-based content providers for transmitting their content as taught by Ferguson et al. because charging users and content providers a fee would greatly increase profitability of the file sharing service.

As per **Claims 2, 10, 18**, Ricci further discloses a method of providing direct marketing by sending marketing content to the client nodes from the server node as well as from other client nodes (0065, lines 1-8). Ricci fails to disclose charging a fee to providers of the marketing content. However, Ferguson et al. teaches charging a fee to providers of the marketing content (C. 14, lines 30-31). Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the method of Ricci to include charging marketing content providers a fee as taught by Ferguson et al. because charging marketing content providers a fee would greatly increase profitability of the file sharing service.

As per **Claims 3, 11, and 19**, Ricci further discloses a method enabling client nodes to become affiliate servers that deliver content to other client nodes (0030). Ricci fails to disclose paying owners of the affiliate servers a percentage of the fee charged for serving the files. However, Ferguson et al. teaches paying the user of the service (C. 9, lines 2-9). Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the method of Ricci to include paying users of the affiliate servers a portion of the fee charged for serving the files as taught by Ferguson et al. because paying owners of the affiliate servers would increase retention of the affiliate server owners.

As per **Claims 4-6, 12-14, and 20-22**, Ricci further discloses a method including the steps of charging a fee from a user of the initiating client node for the download of the fee-based content (0022, 0053). Ricci fails to disclose charging a fee from a provider of the free content for serving the free content. However, Ferguson et al. teaches charging content providers a fee (C. 4, lines 53-60). Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the method of Ricci to include charging content providers a fee for serving the free content as taught by Ferguson et al. because charging content providers a fee would greatly increase profitability of the file sharing service.

As per **Claims 26-28**, Ricci discloses a system for generating revenue in a peer-to-peer file delivery network, the network including at least one server node and multiple client nodes, the method comprising the steps of:

- means for enabling peer-to-peer file sharing of content whereby one client node initiates a download of a particular content item served from the server node or another client node (0018), and
- wherein a fee is charged based on a quantity of the content served (0022, 0053);
- means for providing direct marketing to client nodes such that marketing content is send to the client nodes from the server node as well as from other client nodes (0065, lines 1-8),
- means for enabling client nodes to become affiliate servers that deliver content to other client nodes (0030),

Nonetheless, Ricci fails to disclose:

- means for enabling decentralized downloads of subscription-based content that the client nodes subscribe to in order to receive periodic updates, wherein a fee is charged to providers of the subscription-based content for serving the subscription-based content to the client nodes;
- owners of the affiliate servers are paid a percentage of the fee charged for serving the files.
- a fee is charged to providers of the marketing content.

However, Ferguson et al. teaches users of the system receive periodic updates; levying fees on content providers for transactions with the users; paying users of affiliate servers for serving the files, and finally teaches charging marketing content providers a fee (C. 4, lines 53-60; C. 9, lines 2-9; C. 14, lines 30-31;C. 15, lines 7-11, C. 34, lines 11-17). Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant’s invention to modify the

method of Ricci and include providing periodic updates to users, levying fees on content providers, and to pay owners of affiliate servers for serving the files as taught by Ferguson et al. because charging content providers a fee would greatly increase profitability of the file sharing service. Also, paying owners of affiliate servers because paying owners of the affiliate servers would increase retention of the affiliate server owners.

3. Claims **7, 8, 15, 16, 23-25** are rejected under 35 U.S.C. 103(a) as being unpatentable over Ricci, Pub. No. US2002/0062290 A1 in view of Ferguson et al., U.S. Patent No. 5,819,092 as applied to claims **1, 9, 17 and 29** above, and further in view of Applicants admission of the prior art.

As per **Claims 7, 15, and 23**, Ricci fails to disclose a method of charging a fee from the provider of the marketing content based on a cost per click. However, Applicant discloses that this feature is old and well known, see Specification, Page 11, lines 8-11. Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the Ricci and include charging a fee from the marketing content provider based on a cost per click as disclosed by Applicant. By Applicant's own admission, the feature of charging a fee from the provider of the marketing content based on a cost per click is admitted prior art.

As per **Claims 8, 16, and 24**, Ricci fails to disclose a method of charging a fee from the provider of the marketing content based on a cost per acquisition. However, Applicant discloses that this feature is old and well known, see Specification, Page 11, lines 8-11. Therefore, it

would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the Ricci and include charging a fee from the marketing content provider based on a cost per acquisition as disclosed by Applicant. By Applicant's own admission, the feature of charging a fee from the provider of the marketing content based on a cost per acquisition is admitted prior art.

As per **Claim 25**, Ricci fails to disclose a method for providing subscription-based decentralized file downloads to client nodes in a peer-to-peer public network, each of the client nodes affiliated with a user account, the method comprising the steps of:

- (b) allowing the client nodes to subscribe to one or more of the content files (0057, 0061);
- (c) periodically delivering the particular content files to the respective clients nodes that subscribed to the content files (0040);
- (f) charging the user accounts of the client nodes that received fee-based subscription content files (0022, 0053).

Nonetheless, Ricci fails to disclose:

- (a) receiving content files from at least one content provider, the content including free subscription content files, fee-based subscription content files, and marketing content files;
- (d) charging the content provider a fee for delivering the content files to the client nodes over the network.

However, Ferguson et al. teaches receiving content files from content providers; and also charging content providers a fee for serving the content files to the users (C. 4, lines 53-60). Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the method of Ricci and include receiving content files from content providers and charging content providers a fee for serving the files as taught by Ferguson et al. because charging a variety of content providers a fee would greatly increase profitability of the file sharing service. Ricci and Ferguson et al. nonetheless fail to disclose charging the content provider a fee for the marketing content files based on a number of users that access the marketing content files once downloaded. However, Applicant discloses that this feature is old and well known, see Specification, Page 11, lines 8-11. Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify the Ricci and include charging content provider a fee based on the number of users to access the content as disclosed by Applicant. By Applicant's own admission, the feature of charging a fee from the provider of the marketing content based on a cost per acquisition is admitted prior art.

Double Patenting

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims **1-27** are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims **16 and 17** of copending Application No. 09/814319 in view of Ferguson et al., U.S. Patent No. 5,819,092.

This is a provisional obviousness-type double patenting rejection. Although the conflicting claims are not identical, they are not patentably distinct from each other. Claims **16 and 17** of Application No. 09/814319 recite:

A peer-to-peer file delivery network, comprising:

- at least one server node;
- multiple client nodes coupled to the server node over the network, each of the client nodes running a client application, wherein the client application works and operates in conjunction with the server node to enable secure and reliable peer-to-peer file sharing between two client nodes by,

enable secure and reliable peer-to-peer file sharing between two client nodes by,

- generating account information for a user of each client node, including a digital certificate, in response to a registration process, wherein the digital certificate includes a private key and a public key,
- in response to a file being selected for publication on a first client node by a first user,

  - generating and associating a digital fingerprint with the file,

- generating a bitstream ID for the file and including the bitstream ID in

the fingerprint, and

- using the user's private key to generate a digital signature from the file and including the digital signature in the fingerprint.

adding an entry for the file to a search list of shared files on the server

- node and storing the fingerprint on the server,

- in response to a second client node selecting the file from the search list on the server node, automatically transferring the file from the first client node directly to the second client node, and

- authenticating the file by the second client node by generating a new bitstream ID, comparing the new bitstream ID to the bitstream ID in the fingerprint stored on the server, and using the user's public key to decrypt the digital signature to determine the authenticity and reliability of the file and publisher.

The network of claim **17** wherein the client application operates in conjunction with the server node to enable subscription-based decentralized file downloads to the client nodes by

- allowing the client nodes to subscribe with the server node to periodically receive copies of one of the files,
- when providing a current subscribing client node with the file, locating the closest client node containing the file, and
- transferring the file from the closest node directly to the current subscribing node, thereby efficiently utilizing bandwidth.

Claims **16 and 17** of Application No. 09/814319 differs since it further recites additional claim limitations including generating account information for a user of each client node, including a digital certificate; authenticating the file by the second client node by generating a new bitstream ID; and allowing client nodes to subscribe with the server node to periodically receive copies of one of the files. However, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify claims **16 and 17** of Application No. 09/814319 by removing the limitations directed to generating account information, authenticating a file using a bitstream, and allowing client nodes to subscribe with the server node resulting generally in the claims of the present application since the claims of the present application and the claims recited in Application No. 09/814319 actually perform a similar function. It is well established that the omission of an element and its function is an obvious expedient if the remaining elements perform the same function as before.

Also, claims **16 and 17** of Application No. 09/814319 differ since they fail to recite a method for charging a fee to providers and users of the subscription-based content, either for serving the subscription-based content to the users or for receiving the content. Ferguson et al. teaches a method for levying fees against both users and content providers in an online system (C. 4, lines 53-67). Therefore, it would have been obvious to one of ordinary skill in the art at the time of applicant's invention to modify claims **16 and 17** of Application No. 09/814319 and include the method of charging a fee to providers and users of the subscription-based content as taught by Ferguson et al. because charging users and content providers a fee would greatly increase profitability for the service.

(10) Response to Argument

First Issue

Appellant argues that none of the references, either alone or in combination, disclose periodically sending subscription-based content to a subscribing client node. However, Ricci discloses that collecting royalties without charging subscription fees is an alternative form of levying fees. Ricci actually discloses that the royalty may be a traditional charge (i.e. subscription fees or any other form of charging a user) (Para. 30). Further, Ricci discloses the advertisement information (and therefore advertisement) can be selected by matching the recipient's demographics, interests, and download database, and languages spoken to provide advertisements that would have the greatest impact on the recipient (0064). The server downloads a related advertisement to the recipient…The advertisement can be set to display at various times…the advertisement could also be set to play every time that the digital media is opened (0066). Thus, so far Ricci discloses digital and advertisement information (subscription-based content) and the system sending the information to a user. Furthermore, Ricci discloses the server can change the advertisements being sent to prevent repeats (0067). Therefore, Ricci discloses changing advertisements sent to the user, which also indicates, periodically sending the subscription-based content to each respective subscribing client node.

Moreover, in the broadest reasonable interpretation, "periodically" sending, is taken to mean, occurring at regular times in between events. In the Ricci reference, "the advertisement could also be set to play every time that the digital media is opened (where the server downloads an advertisement to the recipient)", is also taken to be periodically sending content to the user.

Further, Appellant argues that paragraph [0053] of Ricci does not qualify as prior art. Examiner notes page 8 of the provisional application 60/252334 discloses file owners or entities that share files to program the files to report royalties for advertising fees, report number of downloads vs. actual opening of files, reports overall usage of a file's life span. Further, on page 8, Ricci discloses tracking and licensing of files. Also, on page 8, Ricci discloses track all end user destinations for determination of royalty payments. On Page 9, Ricci discloses The software trigger or digital acknowledgement trigger is sent to the servers which originate the file download or transfer, an advertising company is matched to the MPS on route to the user….The invention induced the software trigger…will send the commercials out based on the tag received to the end user simultaneously with the MP3 download (pp. 9-10). Paragraph [0053] discloses a royalty database and licensing of digital media. Therefore, the provisional application does qualify as prior art.

Second Issue

Appellant argues that none of the references, either alone or in combination, disclose charging a fee to providers of subscription-based content for serving subscription-based content. However, the Appellant further recites "the quantity of content corresponds to the actual amount of data being served." As an example, the Appellant's Specification provides that "a sliding-fee scale…..,e.g. $30 for 1 gigabyte…." Examiner notes that the Appellant's specification actually recites "For example, a sliding-fee scale…" It is well established that *examples* in a specification do not further define a claim limitation, and therefore the Appellant's definition for the claim

limitation "charging a fee based on a quantity of content served" is not based on the example given in the specification.

Recent decisions have indicated that if an inventor is relying on a special meaning for terms appearing in the claims, then the special meaning must be clearly written in the specification. "Although an applicant may be his own lexicographer… nothing in the specification defines the phrase 'quantity of content served' differently from its ordinary meaning", see *In Re ThriftI,* 63 USPQ2d 2002, 2006 (Fed. Cir. 2002). "One purpose for examining the specification is to determine if the patentee has limited the scope of the claims.' …For example, an inventor may choose to be his own lexicographer if he defines the specific terms used to describe the invention 'with reasonable clarity, deliberateness, and precision', see *Teleflex, Inc. v. Ficosa N. Am. Corp.,* 63 USPQ2d 1374, 1381 (Fed. Cir. 2002) and *In re Paulsen*, 31 USPQ2d 1671, 1674-75 (Fed. Cir. 1994). Examiner submits that the "number of uses" disclosed by Ricci meets the definition for "quantity of content served" described by the Appellant.

Appellant argues, "the fee in Ricci is the copyright royalty payment". Examiner asserts that a fee owed to a copyright owner wherein the user is charged based on the number of uses (e.g. downloads, duration, etc.) is equivalent to the Appellant's "quantity of content." Further, the Appellant argues that "the amount of the fee charged is not linked to the number of uses in the database." However, Examiner notes that a user purchasing a license to use the digital media would be charged based on the number of licenses that user purchases and therefore would be charged on the "quantity of content served." The Examiner notes the broadest reasonable interpretation of "number of uses" would include "quantity of content served." Further,

Examiner notes during patent examination, the pending claims must be "given their broadest reasonable interpretation consistent with the specification," moreover the Examiner notes claims of issued patents are interpreted in light of the specification, but during examination, prosecution history, prior art, and other claims, must be interpreted as broadly as their terms reasonably allow (MPEP 2111). Thus, the Examiner interprets Ricci to disclose quantity of content served.

Examiner notes that Appellant's argument, "Different files will often be different sizes, and Ricci makes no differentiation between files of different size", is inconsistent with the Appellant's claim limitations. Appellant is attempting to read in a definition into the claim limitations which lacks support in the specification. Further, the claim limitations are broader than the definition that the Appellant is attempting to argue. Appellant's specification fails to define the claim limitation in a manner that one of ordinary skill in the art would read "quantity of content served" differently than the Examiner has already done.

Furthermore, Examiner notes that Ferguson further teaches charging a user based on the quantity of content served. Ferguson teaches, "The ability to set fees to be paid by the user *for an amount of data accessed*, the time spent "logged on" to the online service, or the purchase of particular merchandise…" Ferguson thus teaches that it is old and well known in the art to charge a user based a quantity (i.e. amount) of content (data) served (accessed). Ferguson also teaches, third party content providers can be levied fees for submitting advertisements or for executing a transaction with a user (C. 4, lines 53-60).

Third Issue

Appellant argues none of the references, either alone or in combination, disclose a means for enabling downloads of subscription-based content in order to receive periodic updates. However, Examiner notes Ricci discloses the server can change the advertisements being sent to prevent repeats (updated advertisements) (0067). Further, Ferguson teaches, third party content providers can be levied fees for submitting advertisements or for executing a transaction with a user (C. 4, lines 53-60). Ferguson also teaches a service can be used to provide searchable access to a large corpus of text, to make files on a file server available to geographically remote offices within a company, or to provide software updates to consumers (C. 15, lines 7-11). Thus, the combination of references teaches enabling downloads of subscription-based content in order to receive periodic updates.

Fourth Issue

Appellant argues none of the references, either alone or in combination, disclose paying affiliate server owners a percentage of a fee charged for serving a file. However, Examiner notes that Ferguson teaches a fee specifier that levies a fee on a user for accessing information will be accompanied by another fee specifier that pays part of that fee back to the content provider. Conversely, a fee specifier that pays a fee to the user (e.g., for filling out a market survey questionnaire) will often be accompanied by a fee specifier that levies a comparable fee on the content provider (C. 34, lines 11-17). In the broadest reasonable interpretation, paying part of the fee back to the content provider as taught by Ferguson, reads on paying a percentage of a fee, as claimed by Appellant.

Fifth Issue

Appellant argues that the Patent Office has failed to establish a *prima facie* case of obviousness, the Examiner asserts that the combination of references, i.e. Ricci in view of Ferguson et al., is proper. In this case, one of ordinary skill in the art would have been led to combine Ricci and Ferguson et al. in view of the fact that both references are directed to providing on-line content to users. Also, Ricci and Ferguson et al. are both related to charging users fees for downloading the content. For instance, Ricci discloses a method for distributing and licensing digital media across a network of peers (abstract). Ricci attempts to overcome the difficulties faced by content owners whose digital content was being downloaded in peer-to-peer networks without compensating the content owners by implementing a system that allows peer-to-peer file sharing while at the same time charging users for the content provided in order to compensate content owners. Ricci discloses users downloading a file will pay the appropriate royalty. Paying the appropriate royalty recoups the costs to the content provider for distributing the files, who must then compensate the content creator for use of their content. Furthermore, Ferguson et al. teaches a fee setting tool that allows the developer to develop a fee structure for an online service, e.g. downloading content (abstract). Ferguson et al. further teaches a third party content provider (i.e. content owner) can be paid when that third party content provider supplies valuable information desired by the users of the online services. The action of paying the content providers for supplying the information is in essence compensating the content providers for distributing the files. We have noted that evidence of a suggestion, teaching, or motivation to combine may flow from the prior art references themselves, the knowledge of one of ordinary skill in the art, or, in some cases, from the nature of the problem to be solved. *In re*

Dembiczak, 50 USPQ2d 1614. Therefore, the "motivation-suggestion-teaching" test asks not merely what the references disclose, but whether a person of ordinary skill in the art, possessed with the understandings and knowledge reflected in the prior art, and motivated by the general problem facing the inventor, would have been led to make the combination recited in the claims. *In re Kahn* 78 USPQ2d 1329 (CAFC 2006). Thus, someone of ordinary skill in the art would be led to combine Ricci and Ferguson et al.

Appellant argues that Ferguson et al. fails to teach paying owners of the affiliate servers a percentage of the fee charged for serving the content. However, Examiner notes that the Ferguson reference was cited for teaching charging or paying users or content providers (C. 9, lines 2-9). Ricci was cited for disclosing, "transfers of the digital media can be made on the bandwidth of the peers rather than the originator, i.e., enabling client nodes to become affiliate servers that deliver content to other client nodes (0030). Ferguson et al.'s teaching of paying the content provider or user for the digital media transaction in combination with Ricci's disclosure of peer-to-peer file sharing teaches the Appellant's invention. Paying users who allow other client nodes to download files from their system is a basic economical decision wherein a resource supplier is reimbursed for their resource.

<u>Sixth Issue</u>

Regarding claims **1-27** which were Provisionally Rejected Under The Judicially Created Doctrine Of Obviousness-Type Double Patenting As Being Unpatentable Over Claims 16 and 17 of Co-Pending U.S. Patent Application No. 09/814,319 in View Of Ferguson, once a decision

has been reached regarding the novelty of the Appellant's invention, a Terminal Disclaimer can be filed if necessary.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Fadey S. Jabr
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Examiner, Art Unit 3628

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